Supreme Court, U.S.
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In the
# Supreme Court of the United States
October Term, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
*Respondents,*

v.

HENNEPIN COUNTY, MINNESOTA,
*Cross-Petitioner.*

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
*Respondents,*

v.

HENNEPIN COUNTY, MINNESOTA,
*Cross-Petitioner.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## CONDITIONAL CROSS- PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is the designation of an in-state site for the disposal of locally-generated waste per se invalid under the Commerce Clause, or must the courts conduct a factual inquiry to determine whether the designation process treats in-state and out-of-state interests evenhandedly?

## LIST OF PARTIES

The Oehrleins matter, No. 96-2120 in the court below, and the Robinson Rubber matter, No. 96-2170 in the court below, were considered on consolidated appeal in the court of appeals, and judgment was rendered in a single opinion. Consequently, both matters are consolidated in this petition.

Ben Oehrleins and Sons and Daughter, Inc.; Elk River Landfill, Inc.; Gallagher's Service, Inc.; Knutson Services, Inc.; Randy's Sanitation, Inc.; Poor Richard's, Inc.; Vasko Rubbish Removal, Inc.; Wasteco, Inc.; Waste Systems Corp.; and Walter's Recycling & Refuse Service were appellees in the Oehrleins matter and are petitioners/respondents to the cross-petition here.

Robinson Rubber Products Co., Inc.; Dean M. Akins; Patrick Schoenecker; and Brad Robinson, individually and on behalf of all other persons similarly situated, were appellees in the Robinson Rubber matter and are petitioners/respondents to the cross-petition here.

Hennepin County, Minnesota was appellant in both matters below and is cross-petitioner here.

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Cross-Petitioner Hennepin County respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.[1]

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[2] is reported at 115 F.3d 1372. The opinion of the district court in Oehrleins (Pet. App. B) is reported at 922 F. Supp. 1396, and the opinion of the district court in Robinson Rubber (Pet App. C) is unreported. All three opinions are printed in the Appendix to Petitioners' initial Petition and will not be separately reproduced herein.

## JURISDICTION

The decision of the court of appeals of which review is sought was rendered in an opinion filed on June 9, 1997. (Pet. App. A). The order of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc was filed July 10, 1997. (Pet. App. D). Petitioners/ Respondents to the Cross-Petition filed a petition for a writ of certiorari on October 6, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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[1] This Cross-Petition is conditional in nature; Cross-Petitioner seeks review of the question presented only in the event the Court is disposed to grant certiorari on the initial petition for certiorari filed by Petitioners. For the reasons set forth in Respondent/Cross-Petitioner's Brief in Opposition, the questions presented by petitioners are not appropriate for review in this Court.

[2] "Pet. App. A, B, etc." shall refer to "Petitioners' Appendix A, B, etc." as cited in Petitioners' initial Petition for Writ of Certiorari.

## CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

The United States Constitution, in Article I, Section 8, Clause 3, provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The pertinent provisions of Hennepin County, Minnesota, Ordinance 12 are set out in the appendix at Pet. App. E-F.[3]

## STATEMENT OF THE CASE

This cross-petition presents the question of whether the designation of an in-state waste processing facility pursuant to a local waste designation ordinance is per se unconstitutional, or must the courts conduct a factual inquiry to determine whether such an ordinance discriminates against interstate commerce.

Hennepin County is an urban area in east central Minnesota which includes the City of Minneapolis. Prior to the enactment of the ordinance at issue in this case, Ordinance 12, Hennepin County's waste had been deposited mainly, if not exclusively, in local landfills.

In 1980, Minnesota adopted the Waste Management Act, which required political subdivisions responsible for managing

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[3] Hennepin County Ordinance 12 was enacted on December 10, 1985, amended on October 11, 1988, April 24, 1990, December 21, 1993, August 29, 1994, and June 6, 1995. For the purposes of this petition, the pertinent versions of Ordinance 12 are the October 11, 1988 and December 21, 1993 versions. The October 11, 1988 version is set out in full in Petitioners' Appendix, as is the pertinent excerpt from the December 21, 1993 amendment.

waste, including Hennepin County, to develop plans and implement programs for "the most feasible and prudent reduction of the need for and practice of land disposal of mixed municipal solid waste." Minn. Stat. § 115A.46, subd. 2(c).[4] During the succeeding four years, Hennepin County evaluated all available methods of waste management to determine which would best accomplish the goals of the Act, landfill abatement and resource recovery. Ben Oehrleins and Sons and Daughter, Inc. et al. v. Hennepin County, 115 F.3d 1372, 1377 (8th Cir. 1997). Hennepin County enacted Ordinance 12 on December 10, 1985 in response to specific mandates set forth in the Act and other state and federal environmental legislation.

The process of selecting the best available method of waste management included numerous public hearings, public surveys and questionnaires, and investigation of both public and private sector technologies. Ultimately, the County selected a waste management system which incorporated elements of energy recovery, recycling and composting. Construction of the Hennepin Energy Resource Co. facility ("HERC"),[5] a state-of-the-art waste-to-energy facility located in Hennepin County that burns solid waste to generate electricity, was a major component of the County's comprehensive waste management system. The HERC facility was built with proceeds raised by the issuance of over $141 million in Hennepin County solid waste revenue bonds. No

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[4] Other legislation requiring abatement of landfill disposal included the Metropolitan Landfill Abatement Act, Minn. Stat. §§ 473.842-848, which established funding "to reduce to the greatest extent feasible and prudent the need for and practice of land disposal of mixed municipal solid waste in the metropolitan area," including Hennepin County. Minn. Stat. § 473.844, subd. 1.

[5] HERC derives its acronym from Hennepin Energy Resource Co., the out-of-state entity which built, initially owned, and currently operates the waste-to-energy facility.

private sector company -- in or out-of-state -- was willing or able to build this facility without public financial participation.

Ordinance 12 also was adopted as a part of this comprehensive waste management system. Pursuant to Ordinance 12, Hennepin County designated both this facility and the Elk River Resource Recovery Facility ("ERRRF")[6] as facilities for waste disposal. ERRRF is located outside Hennepin County, and outside the Minneapolis-St. Paul metropolitan area. Neither facility is owned by Hennepin County. The HERC facility is presently owned by United States Trust Company of New York, a New York banking corporation, and is operated by Hennepin Energy Resource Co. Limited Partnership, a Delaware limited partnership, controlled by Ogden Corporation, a Delaware corporation. ERRRF is owned by an affiliate of the Northern States Power Company, a Minnesota corporation.

The district court summarily adjudged that Ordinance 12 was discriminatory, despite factual evidence that the purpose and effect of the ordinance, the selection process for designation, the construction of the facility, and its ownership and operation by out-of-state corporations demonstrate that the designation process treated similarly situated in-state and out-of-state interests evenhandedly.

### A. The Facts Material to This Court's Consideration of the Question Presented.

As required by state law, Minn. Stat. § 115A.84, subd. 3, Hennepin County submitted its Designation Plan to the Metropolitan Council for review and approval.[7] The

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[6] ERRRF is a refuse-derived fuel facility that processes waste into fuel, which is then burned to create electricity.

[7] The Metropolitan Council is an administrative agency created by the Minnesota legislature to coordinate planning and development in the seven-county Minneapolis-St. Paul metropolitan area. Its jurisdiction includes

Metropolitan Council staff independently concluded that "Hennepin County's designation plan demonstrates that there are no other available feasible and prudent alternatives to the resource recovery system," and that "designation is necessary for the financial support of the proposed resource recovery facilities and that less restrictive waste assurance methods are not feasible." The Metropolitan Council approved Hennepin County's Designation Plan on April 25, 1985. Oehrleins, 115 F.3d at 1377-78.

In the preamble to Ordinance 12, Hennepin County expressly noted that it had

> evaluated the benefits of designating a resource-recovery facility for required use and found that such a facility will serve public purposes and welfare by conserving and recovering resources, furthering waste-management plans and policies, reducing the need for land disposal of solid waste, and further finds that the required use of the facility is necessary for the financial support of the facility, and no less restrictive method will assure an adequate, reliable supply of waste . . . .

Ordinance 12, Preamble (Pet. App. 83a). The Metropolitan Council reviewed and approved Ordinance 12.

When Ordinance 12 became effective on June 1, 1989, it required that unprocessed mixed municipal solid waste generated in Hennepin County be delivered: (1) to a processing facility designated by Hennepin County; (2) to a processing facility excluded or exempted from designation;[8] or

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Hennepin County. Minn. Stat. § 473.122.

[8] The Metropolitan Council exempted two privately-operated processing facilities. Other entities, including Oehrleins plaintiff Knutson Services, Inc., received exclusion directly from Hennepin County.

(3) to any other processing facility which was in operation at the time that the Hennepin County designation plan was approved in 1985. Oehrleins, 115 F.3d at 1377. There was no requirement that any of these facilities be located in Minnesota. Moreover, the passage of four years between enactment of the ordinance and its effective date gave ample opportunity for any entity to apply for designation or exclusion.

The record contains no evidence showing that out-of-state interests were excluded from the designation process in any way, either in the choice of designation, or the construction, ownership, or operation of the designated facility. Instead, the record reflects that the HERC facility was constructed and is presently operated by an out-of-state company and is currently owned by an out-of-state company.

**B. Proceedings in the Lower Courts.**

The Oehrleins plaintiffs are in-state waste haulers and two landfills (one in-state and one out-of-state) who filed a lawsuit against Hennepin County in 1994; the Robinson Rubber plaintiffs are a group of Hennepin County waste "generators" -- customers of waste haulers -- who filed suit against Hennepin County in 1995. Both alleged that Ordinance 12 violated the dormant commerce clause, and sought injunctive relief and damages under 42 U.S.C. § 1983.

The district court granted plaintiffs' motion for summary judgment, holding that Ordinance 12 discriminated against interstate commerce. The district court brushed aside the holding and rationale of Harvey & Harvey, Inc. v. Town of Chester, 68 F.3d 788 (3d Cir. 1995), cert. denied, 116 S.Ct. 1265 (1996), which requires a fact-finding inquiry into the selection of a designated facility before the court can find that a flow control ordinance, like Ordinance 12, discriminates against interstate commerce.

The court of appeals, while reversing in part the district court's decision on other grounds, affirmed the district court's rejection of the Harvey & Harvey argument. Because the designation process resulted in the initial designation of only local processing facilities, the Eighth Circuit erroneously concluded that the designation process itself could not have been neutral:

> [E]ven if we were to agree with the Harvey dicta it would not save Ordinance 12 from rigorous scrutiny. The initial designation here simply was not "open." Ordinance 12 was enacted, in part, specifically to insure an adequate waste supply for a certain designated facility: the HERC incinerator. Indeed, the HERC plant was the only disposal facility the Ordinance initially designated, and the interim transfer stations were to accept designated waste for ultimate disposal at HERC. The possibility of an out-of-state processor obtaining designation or getting a later exclusion simply does not alter the initial immediate purpose and effect of the Ordinance, which was to grant an absolute preference to a particular local interest at the expense of all others.

Oehrleins, 115 F.3d at 1384-85.

The court of appeals remanded the case to the district court to consider whether the in-state application of Ordinance 12 violates the dormant commerce clause under the test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), but did not remand for consideration of the issue of whether the designation process was neutral. By instead holding as a matter of law that the designation process "simply was not 'open'," and that the effect of Ordinance 12 was to "grant an absolute preference to a particular local interest," Oehrleins, 115 F.3d at 1385, the courts below bypassed the full factual

inquiry needed to determine whether or not the designation process was in fact "open."

## REASONS FOR GRANTING THIS CROSS-PETITION

### This Court Should Resolve the Tension Between the Third and Eighth Circuits and Delineate the Scope of the Factual Inquiry Necessary to Examine the Constitutionality of a Waste Flow Control Ordinance.

Waste removal and disposition has grown exceedingly expensive and complex as a result of federal and state legislative directives regarding what local governments can and must do with the waste generated by their citizens. These legislative mandates have generally restricted landfilling and promoted recycling and waste-to-energy processing, which are better for the environment but also more costly:

> Waste disposal methods, ranked in descending order of environmental impact, include: source retention and reuse, waste combustion, and landfilling. . . . State and federal environmental mandates often require the use of these new, more expensive facilities. Securing long term access to disposal facilities necessary to protect the citizens' health and safety requires long-term commitments, debt and security.

Harvey & Harvey, 68 F.3d at 792 (emphasis added) (citations omitted).

Local governments responsible for environmentally sound management of increasing amounts of waste must comply with federal and state mandates to reduce landfilling, while at the same time handling the waste in a financially responsible manner. It is in this complex factual milieu that the Court

must make a determination of whether a local ordinance discriminates against interstate commerce. Any such determination should inevitably entail a factually complex inquiry. The entire selection process, not merely the process designating a particular facility, must be considered. Noting that this complex analysis is largely fact-intensive, the Third Circuit held that even those flow control ordinances designating government-owned-and-operated in-state facilities for the processing of waste do not "necessarily violate the dormant commerce clause unless out-of-state businesses did not compete on an even playing field for the designation." Harvey & Harvey, 68 F.3d at 802. Recognizing that issues of discriminatory intent and effect are inherently fact-laden, the Third Circuit resisted the kind of "rush to judgment" which marred the Eighth Circuit's analysis.[9]

The Third Circuit clearly recognized that unless the fact-finding process is thorough, the burden of proving discrimination with facts may be improperly supplanted by ungrounded speculation. Harvey & Harvey, 68 F.3d at 802. By simply accepting plaintiffs' legal arguments and undocumented speculation rather than fully reviewing the entire designation process, the district court and court of appeals focused solely on the result of designation, not the process, and effectively eliminated the plaintiffs' burden, in the first instance, of establishing discrimination.

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[9] The Fourth Circuit reversed and remanded under analogous circumstances, noting that "the district court did not render a factual finding specifically rejecting [the plaintiff's] assertion that the fluctuating treatment cap was enacted for a discriminatory purpose. We are ill-suited to resolve this question in the first instance due to the inherently factual nature of the inquiry." Chambers Medical Techs. v. Bryant, 52 F.3d 1252, 1260 (4th Cir. 1995). The Chambers decision counsels that a factual record should be developed before the court determines whether a flow control ordinance is discriminatory in its effect.

In this case, the district court dismissed the undisputed fact that the County does not own HERC or ERRRF by concluding as a matter of law that the County has a "financial interest" in them.[10] By discounting this evidence and by rejecting the County's argument that the two designated facilities were not the sole places to which waste could be shipped, the district court merely assumed that the designation process discriminated against interstate commerce. Thus, the plaintiffs' burden of proving that Ordinance 12 facially discriminated against interstate commerce was essentially eliminated.

The Third Circuit would have required a different analysis: the burden of proof would have been placed on the plaintiffs to "demonstrate that the designation process impermissibly favored in-state interests/bidders." Harvey & Harvey, 68 F.3d at 802. Defendant would have been required to produce rebuttal evidence only if plaintiffs' evidence indicated that in all likelihood the process had indeed discriminated against interstate commerce. Id. at 803. Although the court expressed doubts as to the constitutionality of the selection process actually at issue in Harvey & Harvey, it nevertheless did not decide as a matter of law that this ordinance was discriminatory. Instead, it remanded the case for development of a factual record. Id. at 807.

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[10] The district court's decision ignored the economic and market realities of waste management planning. Public funding for the construction of waste facilities (like HERC) and contractual guarantees by local governments to private entities (like HERC and ERRRF) of a specified amount of waste are the realities in the current waste disposal market: "In response to the tax changes and increased costs caused by environmental regulation, increased public ownership [of waste disposal facilities] became necessary, shifting the financing burden to the local governments. . . . Even where the municipal government contracts with a private contractor to construct or upgrade the disposal facility, the municipality often continues to bear the risk of an inadequate waste supply through municipal guarantees." Harvey & Harvey, 68 F.3d at 792 (citations omitted).

The same process should have been followed in this case, where evidence of a neutral selection process is stronger than in Harvey & Harvey. In Harvey & Harvey the local government, Chester County, designated two sites as the primary designated sites, both of which were located in the county and built with county financing. Id. at 794. In contrast, one of the two facilities in this case, ERRRF, was not built with county funds and is located outside of Hennepin County. Moreover, Chester County (or its political subdivisions) owns and operates the disposal sites at issue in Harvey & Harvey, id. at 791, 791 n.1, n.2, while Hennepin County neither owns nor operates the HERC facility or ERRRF.

The Third and Eighth Circuits, in their respective decisions, attempted to interpret this Court's decision in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994). Both the ordinance and the facts surrounding the enactment of the ordinance in Carbone were quite different from that of the case at bar. The Town of Clarkstown enacted the ordinance for the express purpose of supporting a pre-existing locally-owned waste transfer station. Under the Clarkstown ordinance, all waste, including waste generated outside the town and/or the state, was absolutely required to be processed at that plant. Ordinance 12, by contrast, has no impact on waste generated elsewhere, and more importantly, only requires processing at a designated or exempted facility, not exclusively at a county-owned facility. Ordinance 12 neither precluded an out-of-state firm from applying for designation, nor prohibited a hauler from taking waste to be processed -- as opposed to landfilled -- at such a facility, so long as it was an excluded, designated, or exempted facility. The absolute restriction in Carbone on hauling waste to any other processor rendered the ordinance discriminatory, giving the locally-owned processor "an advantage over rival businesses from out

of state." Id. at 394. The same is not true here.[11] As noted above, the purpose and impact of Ordinance 12 are quite different from that of the Clarkstown ordinance.[12]

In sum, the undisputed fact is that the HERC facility has always been and is now owned and operated by two out-of-state entities. Whether the process of designating HERC and selecting its owners and its operators was even-handed and open to both in-state and out-of-state interests is a factually disputed issue, one that should not have been decided on summary judgment. If this Court accepts review of plaintiffs'

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[11] This distinction between the Clarkstown ordinance and Ordinance 12 is significant, for Ordinance 12 simply differentiates between different types of competitors, while treating similarly-situated in-state and out-of-state interests the same. The dormant Commerce Clause "does not prevent [local government] from distinguishing between different competitors [such as waste processing facilities and landfills] in the waste market." National Solid Waste Management Ass'n v. Williams, 877 F. Supp. 1367, 1374 (D. Minn. 1995). Thus, the dormant Commerce Clause does not prevent local government from treating waste processing facilities more favorably than landfills. Id.; cf. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471-74 (1981) (state entitled to distinguish between plastic and paperboard nonrefillable milk containers because of perception that plastic caused greater waste disposal problems); Exxon Corp. v. Maryland, 437 U.S. 117, 127 (1978) (state entitled to distinguish between independent petroleum product dealers and producer/refiner petroleum product dealers because the dormant Commerce Clause does not protect the particular structure or methods of operation in a retail market).

[12] A further distinction between the two cases is procedural but significant in light of the need for a thorough factual record to arrive at a Harvey & Harvey determination. While Carbone, like the instant case, was decided on summary judgment, the movant in that case was the town of Clarkstown, and the state court summary judgment ruling upheld the ordinance. Carbone, 511 U.S. at 388. Here, this County has resisted summary judgment, arguing that an analysis of whether the purpose and effect of the Ordinance is discriminatory involves factual issues on which a further record must be made. This Court need not determine that Ordinance 12 is constitutional, only that a fact-finding process will be required to decide whether it discriminates against interstate commerce.

petition, it should also accept this cross-petition, so that the entire liability issue surrounding this flow control ordinance can be examined.

Local governments regularly contract with private firms to supply a wide variety of public services. These contracts often displace other firms that would like to market similar services directly to residents. In the area of waste disposal services, this displacement can take the form of flow control or can result from other techniques, such as a municipal decision to contract with a single hauler for services to the entire municipality. The court of appeals' decision in this case creates uncertainty about the circumstances under which municipalities may take such action, and about the procedures that must be followed to ensure fairness to out-of-state firms. In this core area of local governmental responsibility, the confusion created by the clashing decisions of the Eighth Circuit and Third Circuit should not be allowed to continue. Cross-petitioner respectfully requests that, in the event certiorari is granted for the petitioners, the Court use the opportunity to bring much-needed clarification to the implications of Carbone for local government.

## CONCLUSION

Based on the foregoing, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,


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